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MEMORANDUM

Department of the City Attorney

To: Honorable Mayor and City Council

From: Steven T. Mattas, City Attorney
By: Peter Spoerl, Assistant City Attorney

Subject: Obligations and Limitations on Disclosure of Public Records and Access to Meetings of the Legislative Body under the California Public Records Act and the Ralph M. Brown Act

Date: May 11, 2004

The purpose of this memorandum is to provide the City Council with a brief synopsis of existing state law governing the release of public records and public access to meetings of local legislative bodies under the California Public Records Act and the Ralph M. Brown Act. The information is intended to provide the City Council with a context for evaluating the proposed Standard Operating Procedure governing public access to meetings and the disclosure of public records.

State law authorizes local governments to enact ordinances and internal policies that provide greater access to meetings and records than is provided for or required under state law. The Public Records Act provides in relevant part that "[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself *which allow greater access to records than prescribed by the minimum standards set forth in this chapter.*" Cal. Gov. Code §6253.1 (emphasis added). Similarly, the Brown Act provides that "Notwithstanding any other provision of law, legislative bodies of local agencies may impose requirements upon themselves *which allow greater access to their meetings than prescribed by the minimum standards set forth in this chapter.*" Cal. Gov. Code §54953.7 (emphasis added).

This memorandum is intended to summarize and outline some of the most basic requirements under existing statutes and case law, particularly where these requirements are either duplicated or expanded upon by the proposed policy. While the summaries address some key provisions of the statutes, they are not intended as a comprehensive summary of either law. Rather, they are intended to illustrate key points where the proposed policy would exceed current requirements under state law. Both the Public Records Act and Brown Act are briefly summarized, followed by a matrix outlining key provisions and the most commonly-invoked exemptions to disclosure and access requirements under the statutes. Additionally, the matrices note where elements and provisions of the proposed policy would provide greater access to meetings and records than is currently provided for under state law. Where applicable, the matrices list other Bay Area jurisdictions that have adopted similar policies or ordinances expanding access to meetings and records. The matrices for both statutes are followed by a brief discussion of provisions in the proposed policy that have no clear parallel under state law.

The California Public Records Act

Inspection and release of public records is generally regulated by the California Public Records Act ("the Act"), California Government Code §§ 6250 *et seq.* The fundamental policy of the Act favors disclosure of information relating to the public's business, and a refusal to disclose information must be supported by one of the specific exceptions enumerated therein. State ex rel Division of Industrial Safety v. Superior Court, 43 Cal.App.3d 778, 783 (1974); Cook v. Craig, 55 Cal.App.3d 773, 781 (1976).

California Gov't Code Section	**Substantive Requirement of Provision**	**Exceptions to requirement**	**Would the proposed policy provide greater access to records than required under this *section or applicable* case law construing the section?**
§6253	All non-exempt, state and local government agency records (including reasonably segregable, non-exempt portions of otherwise exempt records) in any form or medium are subject to inspection during office hours, and are subject to being made available for copying on payment of duplication costs or a statutory fee.	See more specific enumerated exceptions discussed below.	No.
§6253(c)	An agency, within ten days of receipt of a request for a copy of records, must determine whether the request seeks copies of identifiable and disclosable public records in the possession of the agency and must notify the person in writing of both the determination and the reasons therefore.		Proposed policy contains additional requirement that Council receive quarterly reports on all public information requests.
§6253.1	To the extent reasonable under the circumstances, help requesters identify records sought in terms that refer to actual categories of records the agency maintains.		No.
§6253.5		A statutory exemption to disclosure requirement for referendum, initiative and recall petitions.	No.
§6254(a)		A statutory exemption for preliminary drafts	The proposed policy

California Gov't Code Section	Substantive Requirement of Provision	Exceptions to requirement	Would the proposed policy provide greater access to records than required under this section or applicable case law construing the section?
§6254(a) (cont)		that are not retained and for which the public interest in withholding such records outweighs the public interest in disclosure. This "preliminary draft" exemption applies to pre-decisional writings containing advisory opinions, recommendations and policy deliberations that an agency has discarded or customarily discards. Unlike the "deliberative process privilege," the "preliminary draft" exemption does not protect factual material. Citizens for a Better Environment V. Dept. of Food and Agriculture, (1985) 175 Cal.App.3d 704, 716-717.	would expand the requirement of disclosure of drafts retained in the ordinary course of business to include drafts of city contracts and agreements. Under current law, in the absence of a retention policy expressly providing that agreement drafts shall be maintained as public records, such drafts could lawfully be destroyed. The proposed policy would impose an affirmative obligation to maintain all such drafts. This provision would require amending the current document retention policy to specify that all drafts should be preserved, and specify a timeframe for required retention.
§6254(b)		Statutory exemption for records pertaining to pending litigation of the agency or to claims under Section 810. "Pending litigation" exemption is limited to records prepared for or acquired in the course of litigation to which the agency is a party. The exemption applies only until the pending litigation has been finally adjudicated or otherwise settled. However, other exemptions, such as the attorney-client privilege, work-product privilege, and the deliberative process privilege may additionally apply, and will survive the litigation.	No. The proposed policy makes clear that records pertaining to litigation are subject to disclosure once the litigation is finally settled or adjudicated, but that disclosure will not be required if the records are still privileged under state or federal law.
§6254(c)		Statutory exemption for personnel, medical or similar files whose disclosure would constitute an unwarranted invasion of personal privacy. The scope of this exemption is not clearly defined. Employee	No. The policy provides that budgetary and salary information is subject to disclosure unless the record is

California Gov't Code Section	Substantive Requirement of Provision	Exceptions to requirement	Would the proposed policy provide greater access to records than required under this section or applicable case law construing the section?
§6254(c) (cont.)		Contracts between state and local agencies and public officials or employees are non-exempt public records. Cal. Gov. Code §6254.8. Arguably, however, salary information of public employees not subject to individual employment contracts is exempt. Braun v. City of Taft (1984) 154 Cal.App. 3d 332, 344-345. Additionally, recent case law has determined that in most cases non-public safety employees have a protected constitutional privacy interest in their salary information and that such information should not be disclosed under the Public Records Act. Section 6254.8, which makes contracts of public agency employees subject to disclosure, is intended to apply only to high level employees covered by individual employment contracts and not to regular civil service employees. Finally, police personnel earnings records are privileged under Penal Code Section 832.7 and disclosure of such records is subject to the notice and hearing requirements contained in Evidence Code Section 1043, et seq. Teamsters Local 856 v. Priceless, LLC, (2003) 12 Cal.App. 4th 1500.	confidential or privileged under state or federal law.
§6254(h) §6254(h) (cont.)		Statutory exemption for the content of real estate appraisals or engineering feasibility estimates and evaluations concerning property acquisition or prospective public supply and construction contracts, but only until all property is acquired or the contract obtained.	Yes. The proposed policy would additionally require disclosure of all real estate purchase agreements not submitted to the Council for approval 30 days after the close of negotiations
§6254(k)		Statutory exemption for records whose disclosure is exempted or prohibited under federal or state law, including records that are privileged under the Evidence Code. These include records covered by the attorney-client privilege, the official information privilege (information acquired in confidence by a public employee in the course of his or her duty and not open or *officially disclosed to the public prior to the* time the privilege is claimed). Cal. Evidence Code 1040.	No. As noted above, the policy provides that "unless expressly exempt under the Public Records Act **or another statute**" (emphasis added), records should not be withheld from *disclosure. This* blanket allowance for existing exemptions

California Gov't *Code* Section	Substantive Requirement of Provision	Exceptions to requirement	Would the proposed policy provide greater access to records than required under this section or applicable case law construing the section?
			would cover these specifically enumerated exemptions.
§6254.9(d)	Requires public agencies to produce all non-exempt writings containing information relating to the public's business prepared, owned, used or retained by any local agency		Yes. Provision requiring Mayor, City Council and City Manager to "maintain and preserve in a professional and businesslike manner all documents and correspondence" would impose a more affirmative obligation to retain all documentation.
§6255		"Catch-all" exemption providing that information where on the facts of the particular case the public interest in non-disclosure clearly outweighs the public interest in disclosure. Includes so-called "deliberative process privilege" for information whose disclosure could discourage candid discussion within an agency and thereby undermine its ability to perform its functions. California First Amendment Coalition v. Superior Court, (1998) 67 Cal.App.4th 159, 169-172. Unlike the preliminary drafts exemption, the privilege also protects factual material since this too may reveal the thought process of government officials.	Yes. The proposed policy provides that information which is exempt from disclosure should be redacted in order that the nonexempt portion of the record may be released. Under existing state case law, section 6255 may be invoked to justify withholding where the burden of segregating exempt from non-exempt information is great, and the utility of disclosing nonexempt information minimal. American Civil Liberties Union Foundation of Northern California, Inc. v. Deukmejian, (1982) 32 Cal.3d 440, 452-453.

Provisions of the Proposed Policy with No Parallel under State Law Requirements

Requirement that the Mayor, City Council and City Manager maintain a Daily Calendar. This record-keeping provision is not required under state law. Although no court has addressed the issue at the level of local government, the California Supreme Court has established that the Act does not require the release of the governor's appointment calendar and schedule as public records, finding

that such calendars may be withheld under section 6255's "catch-all" public interest exemption as a safeguard to the deliberative process privilege and in the interest of security. Times Mirror Company v. Superior Court, (1991) 53 Cal.3d 1325, 1345.

San Francisco's Sunshine Ordinance requires the Mayor, City Attorney and Department Heads to keep and maintain a daily calendar. The Ordinance does not state, however, that the official must include on the calendar the names of individuals attending the meeting.

Requirement that City Maintain a Public Records Index. Compilation of a public records index that identifies the types of information and documents maintained by the City's departments, agencies, commissions and elected officers is not required under the Act. The California Supreme Court has ruled that the Act does not require the maintenance of an index of records available for public inspection. Haynie v. Superior Court, (2001) 26 Cal.4th 1061, 1074-76. The Court reasoned that the imposition of such a requirement would pose substantial burdens and risks to local agencies. "Requiring a public agency to provide a list of all records in its possession that may be responsive to a CPRA request has the potential for imposing significant costs on the agency." *Id.* at 1074. Under state law, however, agencies that do elect to create and make available such records indexes are exempt from requirements to assist records requesters. Cal Gov. Code section 6253.1(d)(3).

Some other cities do maintain such indexes. The City of Berkeley maintains an index of available public records and a retention schedule. The City of Richmond has an unusual provision in its Sunshine Ordinance that requires the City to "cooperate with any voluntary effort by an interested and competent individual or organization to compile a master index to the types of records it maintains."

The Ralph M. Brown Act

The Ralph M. Brown Act, California Government Code section 54950 *et seq*, is the principal California statute governing access to meetings of local legislative bodies (unless noted otherwise, all statutory references are to the California Government Code). The Brown Act requires meetings of "legislative bodies" of local public agencies to be open and public. *See* §54953(a). The Brown Act establishes a clear presumption in favor of public access to public meetings. While the Brown Act establishes broad public rights to attend the meetings of legislative bodies, it also recognizes that under certain limited circumstances, there is a legitimate governmental interest in conducting meetings closed to the public. Such statutory authorized closed sessions primarily involve personnel issues, pending litigation, anticipated litigation, labor negotiations and real property acquisitions.

The Brown Act now covers virtually every type of local government body, elected or appointed, decision-making or advisory, permanent or temporary. Similarly, meetings subject to the Brown Act are not limited to formal gatherings but include communication or device by which a majority develops a "collective concurrence as to action to be taken."

"Legislative body" is defined in the Brown Act to include the governing body of a local agency (e.g., the City Council) and any commission, committee, board or other body of a local agency, whether permanent or temporary, decision making or advisory, created by charter, ordinance, resolution or formal action of the legislative body. "Standing committees" (even those consisting of less than a quorum of the body) are subject to the requirements of the Brown Act. Standing committees have

either (1) a continuing subject matter jurisdiction or (2) a meeting fixed by charter, ordinance, resolution or other formal action of the legislative body. For example, if a governing body creates a long-term committee on a particular subject (e.g., finance, public safety, budget, etc.), such a committee would be considered a standing committee subject to the Brown Act. Cal Gov. Code. §54952(b).

California Gov't Code Section	**Substantive Requirement of Provision**	**Would the proposed policy provide greater access to meetings than required under this section or applicable case law construing the section?**
§54952(c)	Any non-profit corporations created by the legislative body to exercise delegated authority or any non-profit that receives funding from the legislative body and to whose board the legislative body appoints one of its members are subject to open meeting requirements.	No. The policy mirrors this provision.
§54952.2	Defines "meeting" as any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.	No. Statutory definition under Brown Act is already an expansive definition and essentially prohibits any deliberation among members of a legislative body on issues before that body other than at a scheduled public meeting.
§54954.3 (a)	Provides that every agenda for a regular meeting must provide an opportunity for members of the public to address the legislative body on any item under the subject matter jurisdiction of the body. Encompassed in this provision are two types of public comment periods. One is a general comment period in which members of the public may comment on any item of interest that is within the subject matter jurisdiction and is not on the agenda. The other public comment period is with respect to any item on the agenda. Such comment periods on agenda items must be allowed to occur prior to or during the Council's consideration of the item.	While the policy largely tracks this provision directly, it does not mention the exception providing that the agenda need not provide an opportunity for members of the public to address the legislative body on any item that had already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item unless the item has been substantially changed.
§54954.3 (b)	The legislative body is allowed to adopt reasonable regulations including regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.	The policy provides that "time limits shall be applied uniformly to members of the public wishing to testify."
§54954.5	Provides certain "safe harbor" provisions or model formats for descriptions of closed session matters. Substantial compliance with these "safe harbor" provisions if used satisfies agenda description requirements.	The policy would make the permissive provisions of this section mandatory- i.e. the City would, in posting closed session items on the agenda, be required to rely on "safe harbor" provisions.
§54957	So-called "personnel" exception allows a legislative body to meet in closed session to consider the "appointment, employment, evaluation of	Yes. Provision requiring audio or video recording of all closed sessions, to be made available "whenever all

California Gov't Code Section	Substantive Requirement of Provision	Would the proposed policy provide greater access to meetings than required under this section or applicable case law construing the section?
	performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against an employee by another person or employee unless the employee requests a public session."	rationales for closing the session are no longer applicable," would make session available to public in certain instances. State law does not impose a recording requirement.
§54956.9	Provides that a legislative body may meet in closed session to discuss "pending litigation." "Litigation" is defined to include any adjudicatory proceedings including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer or arbitrator. For purposes of the Brown Act, litigation is considered "pending" when any of the following circumstances exist: (a) Litigation to which the agency is a party has been initiated formally, (b) when it has been determined based on certain defined existing facts and circumstances that there exists a significant exposure to litigation (i.e., threatened or anticipated litigation against the agency) or (c) to discuss potential litigation to be initiated by the local agency.	Yes. Provision in policy providing for audio or audio and video recording of all closed sessions under "pending litigation" exception would allow for release of closed session recording two years after the meeting if no litigation is filed; upon expiration of the statute of limitations for the anticipated litigation if no litigation is filed; or as soon as the controversy leading to anticipated litigation is settled or concluded. Current state law does not require recording of closed sessions.
§54956.8	Allows a legislative body to have closed sessions to meet and grant authority to its negotiator regarding real property negotiations and the power to finalize any agreement so negotiated. This closed session item concerns the purchase, sale, lease or exchange of property by or for the agency, and the closed session must be preceded by an open session in which the body identifies both the real property and the persons with whom the negotiator may negotiate.	Yes. Provision requiring audio or video recording of all closed sessions, to be made available "whenever all rationales for closing the session are no longer applicable," would make session available to public in certain instances. State law does not impose a recording requirement.

Provisions of the Proposed Policy with No Parallel under State Law Requirements

Audio and Video Recording of All Meetings of Legislative Bodies, including Closed Sessions. As noted above in connection with closed session exemptions, the proposed policy section requiring recording of all regular and special meetings and closed sessions exceeds state law requirements.

Additional Considerations under the Proposed Policy

The proposed policy will impose affirmative recording, organizational and archival responsibilities on department heads and other staff. These include the requirement of video recording all closed session meetings, providing inspection access to all audio recordings of regular and special meetings, and the requirement that the City prepare and maintain a public records index.

MEMORANDUM

Department of the City Attorney

To: Honorable Members of the City Council

From: Steven T. Mattas, City Attorney
By: Peter Spoerl, Assistant City Attorney

Subject: Hypothetical Scenarios Under Proposed Public Information and Public Access Standard Operating Procedure

Date: May 11, 2004

At the City Council meeting on March 16th, 2004, Councilmember Gomez asked the City Council to consider adopting a Statement of Policy and General Rules to guide the City Attorney in the development of a protocol for public access to meetings and for the disclosure of public records. The City Council requested that the City Attorney consider the proposed policy and develop factual hypothetical scenarios that would illustrate how the proposed policy might look in implementation. This memorandum presents four different factual settings and analyzes potential outcomes under the proposed policy.

Hypothetical #1

Under the proposed policy, the Mayor, the City Council and City Manager would be required to keep, or cause to be kept, a daily calendar recording the time and place of each meeting or event attended by that official related to City business. The calendar would exclude purely personal and social events at which no city business is discussed. The calendar would include a general statement of issues discussed at the meetings, and would be public records subject to inspection by any requester.

Under the hypothetical, the City Manager has been approached by the development director of a prominent local computer software company. The company has a high level of prestige, with a large corporate office in a nearby Bay Area jurisdiction, but is looking to expand operations and relocate their corporate headquarters. The development director is interested in exploring the possibility of relocating and building a large new campus and corporate headquarters in Milpitas. At this point, however, the development director is interested in maintaining a very low profile on the project. Employees have not yet been notified of the potential relocation, and the news of the relocation and expansion figures to have a significant effect on the company's stock price.

The City Manager, realizing the potential for attracting a significant generator of sales tax revenue, would like to schedule the meeting, but also wishes to honor the development director's desire for discretion and low profile at this very preliminary stage of communications. Should the company

decide to pursue its plans to relocate its corporate facilities, it will have to obtain all required land use entitlements and appear in public hearings before the Planning Commission and other City agencies. All of these meetings will be subject to open meeting requirements of the Brown Act, and records reflecting the land use application will be public records subject to disclosure under the terms of the Public Records Act. The project proposal will thus ultimately be subject to the normal open and deliberative process of local land use determinations, and records reflecting this process and decisions made in the course of evaluating the application will be subject to inspection by interested members of the public. Under the proposed policy, however, news of the preliminary meeting between the City Manager and the development director would be a public record subject to inspection by any requester. This could potentially serve to discourage companies from exploring Milpitas as a place for business. The companies might be reluctant at the early stages of their site selection process to have news that the company is considering a move made available to the public because Milpitas City official's calendars are public records subject to inspection.

Hypothetical #2

Under the proposed policy, all closed sessions of any policy body covered would be audio or audio and video recorded, and made available to members of the public "when all rationales for closing the session are no longer applicable." For recordings of closed sessions justified under the "pending litigation" exception to the Brown Act, closed session recordings would be available two years after the meeting if no litigation is filed, upon expiration of the statute of limitations for the anticipated litigation if no litigation is filed, or as soon as the controversy leading to the anticipated litigation is settled or concluded.

Under the hypothetical, a City employee is involved in an accident while driving a City-owned vehicle. This is a model employee who has received numerous commendations and promotions for his excellent service to the City. However, on this one unfortunate occasion, the employee used the City vehicle inappropriately. While his trip with the vehicle started as a part of official City business, he then drove the vehicle to San Francisco to go shopping. While in San Francisco, the employee was involved in an accident that resulted in considerable property damage and personal injury to the other driver. The City is sued and invokes the pending litigation exception to the Brown Act to discuss the case. Since the incident, the employee has been appropriately disciplined, expressed great regret, and has continued to give the City exemplary service. As a part of the closed session discussions, however, the circumstances of his use of the vehicle, and of his violation of City policy and disciplining, are discussed at some length.

Under the proposed policy, the video recording of this closed session would become available at the close of litigation. The employee, who has otherwise served admirably in his job performance, would have details of this one-time transgression memorialized and archived as a permanent public record.

Hypothetical #3

A high level department head is accused of sexual harassment by a staff member, who brings suit against both the individual and the City for tolerating a hostile work environment. This is a highly sensitive matter, strongly contested by the department head, and an emotionally difficult proceeding for the employee, who decided to bring the suit with great reluctance and trepidation about possible retaliation

and publicity from the suit. Invoking the pending litigation exception once again, the City holds a closed session with the City Attorney to discuss the merits of the suit, the history of the contacts between the accused department head and the aggrieved employee, and possible legal strategies available to the City.

As before, under the proposed policy, the video recording of this closed session could become available at the close of litigation. This, in turn, could result in the accuser's name becoming a part of public record, drawing unwanted attention to her identity and to a recounting of the disputed contacts between the employee and department head. In this sense, the policy could potentially serve to discourage employees reluctant to publicize their grievances from bringing forth such claims in the first place.

Hypothetical #4

The City Council, responding to concerns from local land owners and hillside residents, enacts a growth management ordinance. In the wake of its enactment, and following several permit application denials before the Planning Commission and the City Council, a local condominium developer decides to file suit against the City Council in an attempt to overturn the ordinance. Invoking the pending litigation exception, the City Council holds a duly-noticed closed session, during which the Council and the City Attorney discuss the potential takings claims asserted by the developer, potential cures for areas of the ordinance vulnerable to challenge, and various legal strategies. During the closed session, in the context of the present challenge, a council member expresses his personal frustration with this particular developer. He expresses a concern regarding the developer's way of doing business, saying that it is his impression that the developer has not honored his commitments, and that he has personally never been satisfied with the resulting condominium projects that the developer has completed in the City in the past.

Once again, the video recording of this closed session would become available at the close of litigation. Regardless of the outcome of the litigation, it is likely that the developer would continue to be involved in land use applications before the Planning Commission and the City Council. The developers would thus appear before City Council, and the developer, having reviewed the video recording of the closed session on the challenge to the growth management ordinance, might claim that the council member is biased against his company.

CITY OF MILPITAS, CALIFORNIA
STANDARD PROCEDURE

SUBJECT: RESPONDING TO PUBLIC RECORDS REQUESTS AND PROVIDING PUBLIC ACCESS TO MEETINGS AND RECORDS OF LEGISLATIVE AND POLICY BODIES

I. Purpose

This procedure is established to comply with the California Public Records Act (California Government Code §6250 *et seq.*, hereinafter "CPRA") and the Ralph M. Brown Act (California Government Code section 54950 *et seq.*, hereinafter "the Brown Act") regarding public access to records and meetings of the local legislative body. The procedure is intended to clarify and supplement the CPRA and Brown Act and to establish internal procedures that will ensure that the people of the City of Milpitas will remain fully informed and retain control over the instruments of local government in their City.

The procedure establishes a clear process for requesting, disclosing and inspecting City public records, and establishes a framework for providing assistance to the public to make a focused and effective request that reasonably describes identifiable records. Additionally, the procedure establishes guidelines and rules concerning public access to meetings, and establishes recording policies and retention schedules applicable to regular and special meetings of local legislative bodies, as well as closed sessions of the City Council.

II. Public Records Requests Procedure

A. Definitions:

Computer software includes computer mapping systems, computer programs, and computer graphics systems. Computer software developed by a state or local agency is not itself a public record. The agency may sell, lease, or license the software for commercial or noncommercial use.

Confidential records are those records which contain personal or privileged information and include, but are not limited to, personnel records, attorney client privileged documents, certain medical records, certain police records, trade secrets, initiative and referenda petitions and similar records.

Exempt records are those documents and materials defined as confidential records and/ or those specifically cited under the CPRA as exempt and not subject to public release.

Member of the public is any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office or employment.

Person is any natural person, corporation, partnership, limited liability company, form or association

Public records include any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

Trade Secrets are any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, and is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

Writing means handwriting, typewriting, printing, Photostatting, photographing and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or any combination, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums and other documents.

III. Procedure

A. All non-exempt public records shall be made available to the public in accordance with relevant provisions of the CPRA. A record should not be withheld from disclosure unless expressly exempt under the CPRA or another statute. All denials of requests should be accompanied by a brief written explanation for the withholding. Additionally, a record should not be withheld unless all the information in the record is exempt. Information exempt from disclosure should, to the extent reasonable, be redacted in order that the nonexempt portion of the record may be released.

B. Every person has the right to inspect any public record during normal business hours, except those records specifically exempted by law. Except for those records exempted from disclosure by law, the City shall make records available within ten days of receiving a request. If the staff member receiving the request determines that "unusual circumstances," as that term is defined in *Government Code section 6253(c)* (the request involves searching for materials that are off-site, the request involves a voluminous amount of information, the request involves consultation with other agencies, or the request involves a need to compile data) are present, the City may inform the requester in writing that the requested materials will be forwarded them after this ten-day period, in no event longer than 14 days after the end of the original ten-day period.

C. The City, to the extent reasonable under the circumstances, shall assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request. The City Clerk shall create and maintain a public records index that identifies the types of information and documents maintained by City departments, agencies, commissions, and elected officers. If the requested information is not contained within this index, the City shall provide the member of public with assistance in locating records responsive to the request, and shall also describe the information and technology and physical location in which the records exist. The City will also, where appropriate, provide suggestions for overcoming any practical basis for denying access to the records or information sought.

D. No public record may be removed from City offices or facilities, or leave City custody at any time.

E. Any person may arrange to have records copied at City offices by an outside copy service at his/her own expense. A copy service has the same rights of access as any person .

F. Copies of records will be provided within time limits prescribed by law and outlined in the procedures of this policy, or the City shall notify the requesting party in writing of the reason for denying the request. Under certain circumstances specified by law and described more fully above, the time for provision of requested records may be extended.

G. Members of the public seeking public records shall pay a photocopying fee of ten cents per printed page. Members of the public shall not be charged any fees for staff time spent in research or preparation of information pursuant to a CPRA request.

H. The following procedures shall be used in connection with requests for information under the CPRA:

1. The request shall be in writing setting forth, as specifically as possible, the record sought and the name, address and telephone number of the person seeking the record. Oral requests that are reasonably specific and particularized shall be recorded by a staff member and treated as if they were written requests.

2. The request shall be filed with the City Clerk, who shall:

a. Log the request, including the description of the information sought, the date received, and the requester.

b. Identify if the records sought are under his or her control, and if not, determine where the requested records are stored.

c. Determine if the requested information may not be disclosed because the records are exempt from disclosure by law. The CPRA provides that certain documents are exempt from public disclosure. The types of documents that are exempt include, but are not limited to, personnel records, medical records and similar files which would constitute an unwarranted invasion of personal privacy if publicly disclosed; records pertaining to litigation under the California Tort Claims Act to which the City of Milpitas is a party; memoranda from legal counsel regarding pending litigation; preliminary drafts, notes or inter-agency advisory opinions, recommendations and deliberations; records of complaints to or investigations conducted by any state or local police agency; privileged attorney-client communications; initiative, referendum and recall petitions; trade secrets and criminal history information, and certain documents in which the public interest in not disclosing the document outweighs the public interest in disclosing. Where the request clearly falls under one of these exemptions to disclosure requirements, the City Clerk shall inform the requester in writing of the reason for denial. Where there is a question as to whether the records requested are subject to disclosure, the City Clerk shall forward the request to the City Attorney for a determination whether the records, or portions of the records, are confidential or exempt from disclosure.

d. If the requested records are maintained in other departments, request each affected department to search their files and forward all records to the City Clerk's office by a specified date that complies with production timelines as specified in 3(b), above. When the files requested are in the Human Resources Department, and the City Attorney has approved the release of such records, the City Clerk will request Human Resources Staff to provide the copies. All other records will be photocopied and certified by the City Clerk to be true and correct copies. The original records will then be returned to the departments.

e. Once the records have been made, or reviewed and approved or denied by the City Attorney where necessary, not later than 10 days after the request has been received, notify the person making the request of the determination and if the determination is to withhold, set forth in writing a brief explanation of the reason and justification for the withholding.

f. In order to better monitor and oversee timeliness of responses to public records inquiries, the City Council shall receive and review regular quarterly reports on all requests for public information, as recorded by the City Clerk. The report shall contain the type of request, the date the request was made, the date on which the records were released, a copy of all written justifications for withholding, and an explanation for any delays in the processing of requests. Such reports will not identify requester information or any other information confidential by law.

3. In addition to the requirements imposed under the CPRA, the following policies shall apply to Departments of the City of Milpitas:

a. Records of preliminary drafts must be retained in strict accordance with any adopted document and retention policy and practice. Preliminary drafts of documents that are kept in the ordinary course of business, and which are in fact retained by a given department and preserved after final action has been taken, including drafts of agreements, shall be disclosed upon request.

b. Unless privileged under state law, when litigation is finally adjudicated or otherwise settled, records of all communications between the City and the adverse party are subject to disclosure. Such disclosure shall extend to the text and terms of the settlement.

c. All records of contractors' bids are available for inspection immediately following the opening of bid packages. Responses to Requests for Proposals shall be available for inspection after staff has reviewed the documents and forwarded its recommendation to the Council. When a given firm is awarded a contract, information which was submitted to the City as a part of the bid is subject to disclosure unless otherwise exempt under state or federal law.

d. All budgetary information, including invoices, bills and records of payments submitted to the City Council for approval, are subject to disclosure unless the records reflected therein is confidential or privileged under state or federal law.

e. All appraisals, offers and counter-offers relating to the City's purchase of real property shall be exempt until the agreement is executed. In the event a purchase and sale agreement is not submitted to Council for approval, then this exemption shall expire 30 days following the end of negotiations.

f. The Mayor, members of the City Council and the City Manager shall keep or cause to be kept a daily calendar recording

the time and place of each meeting or event attended by that official relating to official City business. This requirement shall exclude purely personal and social events at which no City business is discussed. Each calendar entry shall include a listing of all persons present at the meeting, and a brief general statement of the issues discussed. Such calendars shall be public records subject to disclosure under the terms of the CPRA and the procedures established herein.

g. The Mayor, members of the City Council and the City Manager shall maintain and preserve in a professional and businesslike manner all documents and correspondence, including but not limited to letters, emails, draft memoranda, invoices, reports and proposals and shall disclose all such records in accordance with the CPRA and this policy.

IV. Information in Electronic Format

A. Unless otherwise prohibited by law, if the City has any information that constitutes an identifiable public record not exempt from disclosure pursuant to the CPRA that is in electronic format, the City shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

1. The City shall make the information available in any electronic format in which it holds the information.

2. The City shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the City to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of the record in an electronic format.

B. Notwithstanding 1(b), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record, when either of the following applies:

1. In order to comply with the provisions of Paragraph 1, the City would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

2. The request would require data compilation, extraction, or programming to produce the record.

C. Nothing in this section shall be construed to require the City to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.

D. If the request is for information in other than electronic format, and the information also is in electronic format, the City may inform the requester that the information is also available in electronic format.

E. Nothing in the section shall be construed to permit the City to make information available only in electronic format.

F. Nothing in this section shall be construed to require the City to release an electronic record in the electronic form in which it is held by the City if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software with which it is maintained.

G. Nothing in this section shall be construed to permit public access to records held by the City to which access is otherwise restricted by law.

V. Public Access to Meeting of the Legislative Body

A. The City of Milpitas shall comply fully with all open meeting requirements of the Brown Act. In addition to the requirements imposed by the Brown Act, the following supplemental policies and procedures shall apply:

1. In addition to the brief general description of items to be discussed or acted upon in open and public session, the permissive "safe harbor" provisions of Government Code Section 54954.5 are mandatory with respect to closed sessions.

2. All closed sessions of any policy body covered under the Brown Act shall be either audio recorded or audio and video recorded in their entirety and all such recordings shall be retained for at least ten years, or permanently where technologically and economically feasible. Closed session recordings shall be made available as public records subject to inspection and copying by members of the public whenever no rationale for closing the session is still applicable. Recordings of closed sessions justified under the "pending litigation" exception under the Brown Act shall be released as public documents according to the following provisions: Two years following the meeting if no litigation is filed; upon expiration of the statute of limitations for the anticipated litigation if no litigation is filed; or as soon as the controversy leading to the anticipated litigation is settled or concluded.

3. Each policy body shall audio record each regular and special meeting. Each such audio recording, and any audio and video recording

of a meeting of any other policy body made at the direction of the policy body, shall be a public record subject to inspection pursuant to the CPRA and the procedures established herein. Inspection of any such recordings shall be provided without charge on an appropriate playback device made available by the City.

4. The City Clerk or secretary of each policy body shall record the minutes for each regular and special meeting of the policy body. The draft minutes shall be available for inspection and copying no later than ten working days after the meeting. The officially adopted minutes shall be available for inspection and copying upon request no later than ten working days after the meeting at which the minutes are adopted.

Policies in Place in Santa Clara County and Other Bay Area Jurisdictions

Santa Clara County Cities

City	Sunshine Ordinance?	Policy in Place?	Record Closed Sessions?	Daily Calendar (Council/Mayor?)	Comments
Campbell	No	Yes- Public Records Policy under Section 11 of City's Standard Operating Procedures covers release of all public records and information.	No	No	Policy essentially tracks existing requirements under state law. Provides that when department heads determine that a given request is "disruptive," the request may be forwarded to the City Manager.
Cupertino	No	No (Complies with CPRA, GC 6253 and Brown Act).	No- Clerk keeps written minutes that are available only to those in attendance at the session.	No	
Gilroy	No	Yes- Public Record Release Policy documents dated October 2002 act as internal operating procedure.	No	No	Policy provides detailed internal procedures for handling public records requests, centralized through the City Clerk's office.
Los Altos (did not respond)					
Los Altos Hills (did not respond)					
Los Gatos	No	Yes –provisions in administrative manual and council policy	No. Minutes taken of closed sessions available to Council	No	Various provisions in administrative manual and council policy

City	Sunshine Ordinance?	Policy in Place?	Record Closed Sessions?	Daily Calendar (Council/Mayor?)	Comments
Los Gatos (cont.)		cover access to meetings and retention of videotapes of regular council meetings.	only		documents outline obligations under Public Records Act and Brown Act .
Monte Sereno	*No*	No	No	No	
Morgan Hill (did not respond)					
Mountain View	No	No (Complies with CPRA, GC 6253 and Brown Act).	No	No	
Palo Alto	No	No (Complies with CPRA, GC 6253 and Brown Act) Policies and Procedures and Administrative manual track state law requirements.	No	No	Policies and Procedures and Administrative Code refer to existing requirements under Public Records Act and Brown Act.
San Jose (did not respond)					
Santa Clara Santa Clara (cont.)	No	Yes –City Manager's Directive dated 7-23-03 outlines procedures for handling public records requests.	No	No	City Manager's Directive outlines detailed procedures for responding to public records requests.
Saratoga (did not respond)					
Sunnyvale	No	No (Complies with CPRA, GC 6253 and Brown Act)	No	No	

Other Bay Area Cities

City	Sunshine Ordinance	Policy in Place	Record Closed Sessions	Daily Calendar (Council/Mayor?)	Comments
Berkeley	No, City Clerk has been requested to draft one and will finalize in next few months.	Yes – Public Information request procedures are outlined in the City Clerk's procedures manual.	Yes - Clerk keeps minutes and videotapes for review by attendees only; tapes kept for 2 years.	No	City Clerk policy provides that departments "will attempt" to provide responses to public records requests within 3 working days, a quicker response time than the 10-day window provided for under the Public Records Act. Records all closed sessions and keeps video recordings for two years, but video recordings are available for viewing only by those in attendance at the meeting, and only after signing in and under the supervision of the City Clerk.
Hercules	No	No	No	No	
Oakland	Yes	Yes --Procedure established by Council Resolution.	No	No	Expansive Sunshine Ordinance provides that permissive provisions of Government Code 54954.5 are mandatory with respect to closed

City	Sunshine Ordinance	Policy in Place	Record Closed Sessions	Daily Calendar (Council/Mayor?)	Comments
Oakland (cont.)					sessions, that preliminary drafts and memoranda shall not be exempt from disclosure, that certain personnel information that could legally be withheld shall not be exempt from disclosure, that all budget information, including bills, claims, invoices, vouchers and other records of payments, is subject to disclosure. Additionally requires all local bodies to maintain a communications file, organized chronologically and accessible to any person during normal business hours, containing a copy of every letter, memorandum or other writing which the clerk or secretary of such body has distributed to a quorum of the local body concerning a matter placed on the agenda in the

City	Sunshine Ordinance	Policy in Place	Record Closed Sessions	Daily Calendar (Council/Mayor?)	Comments
Oakland (cont.)					previous thirty days or to be placed on the agenda in the coming thirty days.
Redwood City	No	Yes –Charter Section 84 provides for procedures.	No	No	
Richmond	Yes	Yes- established by ordinance.	No	No	Ordinance requires each department to maintain a recent correspondence and memoranda file as a public record. Provision very similar to that contained in Oakland Sunshine Ordinance (see above). Ordinance also provides that no prelitigation claim may be withheld by invoking the exemption.
San Bruno	No	No -- (Complies with CPRA, GC 6253 and the Brown Act); City Attorney memo provides guidelines for staff implementation .	No	No	
San Francisco	Yes	Yes	Yes- Requires City boards and commissions to audiotape all closed	Yes	Expansive Sunshine Ordinance requires Mayor, City Attorney and Department

City	Sunshine Ordinance	Policy in Place	Record Closed Sessions	Daily Calendar (Council/Mayor?)	Comments
San Francisco (cont.)			sessions. The session audiotape must be retained for at least ten years, or permanently where "technologically and economically feasible." A board or commission must make closed session audiotapes "whenever all rationales for closing the session are no longer available." Where a board or commission meets in closed session with legal counsel under the "anticipated litigation" exception, the audiotape is made available to the public (a) two years after the meeting if no litigation is filed, (b) upon expiration of the statute of limitations for the anticipated litigation if no litigation is filed, or (c) as soon as the controversy leading to the anticipated litigation is settled or concluded		Heads to keep an maintain daily calendar as a public record. Goes beyond open meeting law to require "Passive meeting" bodies (advisory bodies, social, recreational or ceremonial occasions sponsored or organized by or for a policy body, governing boards of any entity that owns, operates or manages any property in which the City has or will have an ownership interest, any committee created by the initiative of a member of a policy body, the Mayor, or a department head) must hold open meetings, though these need not be formally noticed.

City	Sunshine Ordinance	Policy in Place	Record Closed Sessions	Daily Calendar (Council/Mayor?)	Comments
San Pablo	No	No	No	No	
Walnut Creek	(Did not respond)				

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